IN THE MATTER OF THE ARBITRATION BETWEEN:	)	
	)	
MIAMI TOWNSHIP	)	FMCS CASE NO:
	)	08-02421
Employer	)	
	)	
and	)	
	)	
FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.	)	
	)	
Union	)	
	)	

DECISION AND AWARD

ARBITRATOR: Saundria Bordone

AWARD DATE: November 20, 2008

APPEARANCES FOR THE PARTIES:
EMPLOYER: John Korfhagen, Law Director, Miami Township
UNION: Kay E. Cremeans, General Counsel, FOP/Ohio Labor Council, Inc.

I. Introduction

Using the services of the Federal Mediation and Conciliation Service, the undersigned was selected as Arbitrator. An arbitration hearing was held August 20, 2008, in Milford, Ohio. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral and written argument. Briefs were filed, the last of which was received November 8, 2008. The parties stipulated that the matter is properly before the arbitrator and the issue is:

> Did the Employer violate the collective-bargaining agreement when it
> (a) refused to pay all employees 12 hours of holiday pay, and
> (b) refused to allow employees to work the holidays that fall on their normal workday?
> If so, what shall the remedy be?

II. Relevant Laws and Contract Language

Ohio Revised Code § 4117.08(C)(5) provides:

> (C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117, of the Revised Code impairs the right and responsibility of each public employer to:
>
> * * * * * * * *
>
> (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:

The parties' most recent collective-bargaining agreements are effective by their terms from January 1, 2005 through December 31, 2007, and from January 1, 2008 through December 31, 2010. The following provisions of these agreements contain the same relevant language:

Article 1 Agreement/Purpose

Section 1.1. This Agreement, entered into by the Miami Township Board of Trustees, Clermont County, Ohio, hereinafter referred to as the "Employer", and the Fraternal Order of Police, [Ohio Valley Lodge #112] [Ohio Labor Council INC] hereinafter referred to as the "FOP", has as its purpose the following:

To comply with the requirement of Chapter 4117 of the Ohio Revised Code; and to set forth the full and complete understandings and agreement between the parties governing the wages, hours, terms and other conditions of employment for those employees included in the bargaining unit(s) as defined herein; and to promote orderly, constructive and harmonious relations between the Employer and the FOP.

Article 6 Management Rights

Section 6.1. The Employer possesses sole right to operate the Department and all management rights repose in it. The Employer's exclusive rights shall include, but shall not be limited to, the following, except as expressly limited by the terms and conditions set forth in this Agreement:

a. Determine matters of inherent managerial policy which include but are not limited to areas of discretion or policy such as functions and programs of the Township, standards of services, its overall budget, utilization of technology, organizational structure, and right to determine productivity standards.

b. Direct, supervise, evaluate, promote or hire employees;

c. Maintain and improve the efficiency and effectiveness of operations and programs:

d. Determine the overall methods, process, means or personnel by which operations are to be conducted;

e. Suspend, discipline, demote, or discharge for just cause;

f. Determine the adequacy of the work force;

g. Determine the mission of the Department as a unit of Township government;

h. Effectively manage the work force.

i. Take actions to carry out the mission of the Township as a governmental unit.

Section 6.2. The FOP recognizes and accepts that all rights and responsibilities of the Employer not specifically modified by this Agreement shall remain the functions of the Employer.

Article 8. Grievance Procedure

* * * * * * * *

Section 8.6.

* * * * * * * *

Step 4. Arbitration.

* * * * * * * *

a. …. The arbitrator shall limit his decisions strictly to the interpretation, application, or enforcement of specific articles in this Agreement. He may not modify or amend the Agreement.

Article 14. Hours of Work and Overtime

* * * * * * * *

Section 14.6. Regular work schedules shall be posted ten (10) days prior to their effective date. Seven (7) days notice must be given to any non-emergency change in a posted schedule.

Article 17 Holidays

Section 17.1. Employees shall be entitled to the following paid holidays:

New Year's Day	(1st Day of January)
Martin Luther King Day	(3rd Monday of January)
President's Day	(3rd Monday of February)
Memorial Day	(4th Monday of May)
Independence Day	(4th Day of July)
Labor Day	(1st Monday in September)
Columbus Day	(2nd Monday in October)
Veterans Day	(11th Day of November)
Thanksgiving Day	(4th Thursday in November)
Christmas Day	(25th Day of December)

Section 17.2. All holidays shall be observed on the actual dates listed above. All holidays are twelve (12) hours in length. An employee who works a shift where the scheduled hours are on a holiday, shall be entitled to holiday compensation for hours worked on the holiday

Section 17.3. Only employees working New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas are entitled to one and one half (1-1/2) times their hourly rate in addition to their scheduled hours.

Section 17.4. Employees not scheduled to work on a holiday listed in Section 17.1 above shall receive, as "holiday pay", their normal hourly rate times the number of hours equal to their normal work day, unless the employee is on an unpaid leave of absence or a disciplinary suspension when the holiday is observed.

Section 17.5. Employees required to work on a holiday listed in Section 17.1 above shall receive holiday pay as defined in Section 17.4 above, and shall additionally be paid their normal hourly rate for all hours actually worked on the holiday.

Article 36 Employee's Rights

* * * * * * * *

Section 36.9.[1] The Employer agrees to treat all members in an equal and fair manner.

The language at Section 40.3 is different between the agreements. In the Agreement effective from January 1, 2005 through December 31, 2007, it provides:

Section 40.3. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right to make demands and proposals on any subject matter not removed by law from the area of collective bargaining, and that the entire understandings and agreement arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. The provisions of this Agreement constitute the entire agreement between the Employer and FOP and all other prior agreements, either oral or written, are hereby canceled. Therefore, the Employer and the FOP, for the life of this Agreement, each voluntarily and unequivocally waives the right, and each agrees that the other shall not be obligated, to bargain collectively or individually with respect to any subject or matter not specifically referred to or covered in this Agreement.

The language of Section 40.3 in the Agreements effective from January 1, 2008 through December 31, 2010, follows:

[1] This provision is Section 36.10 in the Agreements which is effective by its terms from January 1, 2005 through December 31, 2007.

Section 40.3. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right to make demands and proposals on any subject matter not removed by law from the area of collective bargaining, and that the entire understandings and agreement arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. The provisions of this Agreement constitute the entire agreement between the Employer and FOP and all other prior agreements, either oral or written, are hereby canceled. Neither party can modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute.

III. Facts[2]

Employees of the Miami Township Police Department are represented in two separate bargaining units: one composed of officers and corporals, and the other composed of sergeants. Three collective-bargaining agreements of the parties are in evidence. One of the agreements covers both units and is effective by its terms from January 1, 2005 through December 31, 2007. The other two agreements, one covering each unit, are effective by their terms from January 1, 2008 through December 31, 2010. The dispute here pertains to specialized assignment officers and the sergeant (hereinafter referred to as Sergeant) who supervises most of them and has supervised them since about December 31, 2007.[3] Road patrol officers work 12-hour shifts per day; specialized assignment officers work either 10[4] or 8.25 hours per day depending on their specialized assignment position; and the Sergeant works 8.5 hours per day.

The parties tried to resolve this dispute in the most recent contract negotiations, but, when they were unable to reach agreement, they agreed to remove it from negotiations and "let the arbitrator decide this issue."

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[2] Some evidence presented by the parties but not considered material to the issues as framed in Part V. below, is not described here.

[3] Sergeant did not testify to the date he began supervising the specialized assignment officers, but Grievant explained that Sergeant did not have any backpay listed in the grievance for Christmas 2007 because Sergeant "was on the road at that time. He started his new position December 31st." Further, in his testimony, Sergeant alluded to his present position being new to him.

[4] There are some indications in the record that employees in these positions may actually work 10.5 hours per day.

The grievance underlying this arbitration was filed on January 3, 2008,[5] by one of the specialized assignment officers (hereinafter referred to as Grievant) "on behalf of Class Action Grievants;" alleges violation of "Art. 14, Sec. 14.6, Art. 17, Sec. 17.2, 17.3 & Art. 36, Sec. 36.10;" and states:

> On 12/28/07 at 1506 hours, grievants received e-mails and personal notifications from [Captain] advising officers in specialized assignments were order [sic] not to work the holiday on 1/1/2008. [Grievant] confronted [Captain][6] with the violation of the contract and [Grievant] was advised to see the Chief. [Grievant] responded to the Chief's office and was told by the Chief "he did not want to hear it, get out". Grievant advised both [Captain] and the Chief that [Grievant] was headed to speak with [Administrator].[7] [Grievant] was ordered by [Captain] not to speak with [Administrator] or face discipline. [Captain] also advised officers in specialized assignments would only be paid 8.25 hours for the holiday on 12/25/07. [Captain] advised he deducted 3.75 hours from the payrolls of officers assigned to specialized units.
>
> Requested remedy: Complete and full payment to officers affected by the above action as reflected in attachment #1. [A listing of the specific remedy for each involved employee]. Payment of interest to officers of the above money to be determined by an arbitrator. The employer must adhere to the agreement reached by the union and the employer 11/5/2007.

At the arbitration hearing, the Union presented only Grievant and Sergeant as witnesses, and the Employer presented the Chief of Police (Chief) as its only witness. Grievant was the Union representative for the unit of officers and corporals until sometime in 2005, and then was elected to the negotiating team for that unit in September 2007 for the negotiation of that unit's January 1, 2008 through December 31, 2010 Agreement which was signed March 1, 2008. Sergeant became a sergeant in July 1996 and was the Union representative for the sergeants' unit for 10 years until his resignation from that position effective December 31, 2007. The Chief has been the Miami Township Chief of Police for more than 13 years.

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[5] The parties agreed that this grievance would be a sufficient basis for the arbitrator to address not only the holiday pay for December 25, 2007 and January 1, 2008, but all subsequent holidays.

[6] Captain refers to the Captain in charge of the division in which most of the specialized assignment officers work.

[7] Administrator refers to the Miami Township Administrator. He is designated as Step 3 in the parties' grievance procedure.

Grievant testified that he had been a road patrol officer until he became a detective (a specialized assignment position) in April 2007. According to Grievant, as a road patrol officer he worked 12-hour shifts daily, worked 12-hour shifts on all holidays that fell on his regular workdays, and was paid 12 hours of holiday pay for each holiday. Grievant testified that when he was interviewed by Chief and Captain for the detective position, the Grievant expressed his concern that if he became a detective he would be able to continue to work 12 hours on any holiday that fell on his regular workday and that he would continue to receive 12 hours of holiday pay for each holiday. According to Grievant, Chief and Captain assured him that he would. Grievant also testified, "It wasn't like that was a bonus to me or anything else, that was the practice at the time." The Chief, when asked on direct if Grievant's account of this conversation was correct, replied, "I can't recall if it's correct or not correct, too long ago." Chief was then asked, "Were any promises made to him [Grievant] that he would be able to continue to work 12 hours?" Chief replied that he did not recall.

Grievant testified that on his first three holidays as a detective, Memorial Day, Independence Day, and Labor Day of 2007, he worked 12 hours, was paid for the 12 hours worked, and was paid 12 hours holiday pay. Then, according to Grievant, on the next holiday, Columbus Day, "I worked an eight-hour shift and I put in for 12 hours based on the contract language," but, "It was denied. I was paid for the eight hours, or actually, eight and a quarter hours of holiday pay, which was from [Captain]. And I subsequently started to organize a grievance." Grievant testified that he never filed that grievance, but he and Sergeant met with Chief, discussed the issue at length, and "Chief had agreed to our remedy, to what we were requesting." According to Grievant, Chief asked him to put their agreement in writing, which he did and sent it to Chief in an e-mail dated November 2, 2007. Grievant testified that Chief subsequently asked only that the word "new" in the e-mail be changed to "interpretation." According to Grievant, when he met with Chief and was asked to change the word "new" in the e-mail to "interpretation," Chief "showed me on his computer screen actual contract language that he was going to introduce in contract negotiations. And I read through it and it was beautiful.... It was exactly what we wanted."

The e-mail, as corrected, is in evidence as Joint Exhibit 6 and reads as follows:

> Chief, per our conversation, I put the interpretation holiday pay policy in written form. If you have any issues with my understanding of the policy, please let me know.
>
> All employees will be compensated for 12 hours of holiday pay when the holiday falls on the employees regular work day. Article 17.4 of the CBA will still apply when the holiday falls on the employees scheduled day off. If an employee works more that 12 hours on any holiday, that employee will only be entitled to 12 hours of holiday pay regardless to the additional number of hours worked.
>
> Employees can continue to work holidays as before as long as the holiday falls on their normal work day.
>
> Employees on approved paid time off (vacation, personal day, comp time, and sick time) on a holiday will continue to be paid the employee's holiday pay as well as the paid time off.
>
> We also came to an understanding to address this issue and to write clear language into the contract regarding this issue in the upcoming contract negotiations. The following list includes the employees that need to be paid additional pay due to the resolution of this issue. [List of 12 names, with "3.75 hours" written beside the first 10 names, "8.25 hours of vacation pay" written beside the 11th name, and "8.25 hours of holiday pay" written beside the 12th name.]
>
> Any questions or issues, please let me know. Thanks again for your attention and understanding in this matter.

Sergeant testified that, in a meeting with Chief in early June 2007, after settling a personal day grievance, Sergeant informed Chief that there was a similar issue on the horizon "which was the holiday issue." According to Sergeant, when he asked Chief if he wanted to discuss and resolve that issue, Chief replied saying something similar to, "well, we're coming up on negotiations, why don't we let that ride for now and we'll work that out in negotiations." Sergeant testified that the holiday issue did arise when Grievant was denied the holiday pay in about October 2007, a grievance was filed, and he [Sergeant] was invited to the meeting between Chief and Grievant, perhaps because "there was a class action pending on it since it affected everyone." Regarding that meeting, Sergeant testified:

> The problem was that [Grievant] worked an eight and a quarter hour shift and was only being paid for eight hours of holiday pay, instead of the typical 12 hours. And there were some clarifications made in that meeting, but in a nutshell, it was agreed

> that the agency would pay holidays to everyone at the 12-hour rate to keep it fair and equal. That occurred – and I believe there was backpay involved in that to [Grievant]. And that occurred and remained in force. And I believe it was a document, an e-mail that went between [Grievant] and [Chief] to put in writing what the agreement was. And there was an additional agreement that it would be implemented into the contract so that this would be resolved once and for all. That was honored up until the end of 2007. And then, January 1st, that all changed and is what brought us here today.

Sergeant identified Joint Exhibit 6 as the e-mail he was referring to in his above-quoted testimony.

Chief testified as follows, on direct examination, regarding the meeting that resulted in Grievant's November 2, 2007 e-mail, and he also stated that he understood the roles of Grievant and Sergeant in the meeting to be that of grievants:

> My memory of that meeting and the circumstances leading to it was that we – I was told that there was a grievance pending – I was probably going to be hit with a class action grievance for the Columbus Day holiday, and that I wanted to try and head that off, try to resolve it. And I was contacted by [Sergeant] on at least one occasion, maybe twice, by e-mail asking for a meeting. It was a very busy time for me and I had trouble finding the time, but when I did, I said, okay, we'll meet. And I don't remember if I invited [Grievant], I may have, but he came along anyway. And we talked about the issue surrounding what they were going to grieve and what the basis for it was. It really goes to the heart of what I see this grievance and this arbitration is about, pretty much as [Union's attorney] has explained it, we don't know how to interpret Article 17. If you look at the different paragraphs of it, I read it, I have an understanding of it. I think that I can interpret it. But when I explain it to the Union representatives, they say, no, we don't agree, that's not how we interpret it. So we're at loggerheads. I wanted to resolve the grievance. I didn't want a class action grievance. And I said, okay, I will pay you for Columbus Day, we'll resolve that. We'll get that out of the way and behind us. Here's what we'll do for the rest of this year, and we've got to get this on the bargaining table and get this resolved once and for all because I don't want this to keep coming back. That's my understanding of what we were doing.

When Chief was asked on direct examination if he had any other intention than to settle the grievance in this meeting, Chief responded, "Only to say that I wanted to get this on the table for negotiations and to get it finally resolved."

According to Chief, he presented his proposed contract language to the Administrator who discussed it with the township trustees. When asked what the township trustees' reaction was, Chief replied, "We're not changing it."

The Grievant testified that the remedy set forth in the November 2, 2007 e-mail was paid, and the following two holidays, Veterans' Day and Thanksgiving, were paid in accordance with the e-mail, but there were some problems in how some of the specialized assignment employees were paid for Christmas 2007. Then, on Friday, December 28, 2007, Captain issued three e-mails, each addressed to the employees it concerned. They are in evidence as Joint Exhibit 7. The first says: "No investigators [detectives] are to work New Years day unless they are called in to investigate a crime or called in to work the road." The second says: "No School Officers [a classification of specialized assignment officer] are to work on New Years day unless they are called in to work the road." The third says: "The office is Closed on New Years Day. There is no light duty for that day." According to the Grievant, when he saw these e-mails he spoke to Captain and then to Chief, with no success. This grievance was filed January 3, 2008.

Sergeant testified that the pay issues regarding Christmas 2007 arose when a specialized assignment officer who worked 8 hours as a road patrol officer on Christmas so that road patrol officer would not have to work that day, put in for 12 hours holiday pay which Captain reduced to 8 hours. Sergeant testified:

> When [the specialized assignment officer] turned in his payroll sheet, [Captain] who is his supervisor and has to sign off on his sheet, seen that he had worked eight hours, but he had put in for 12 hours of holiday pay. [Captain] was not privy to this agreement that was reached between the Union and [Chief], so naturally it didn't make sense to him. He was shocked by that and upset by it. So when he responded, he said, you know, I'm not paying this, and no one working in specialized assignments will work holidays anymore. [Grievant] went up and spoke to [Captain] about it, explained this agreement, showed him the agreement. He said, oh, I wasn't aware of that. You're right.

With regard to the December 28, 2007 e-mails from Captain, the following exchange occurred on direct examination of Sergeant:

> Q: Prior to [these] e-mails coming out, were employees ever told or ordered not to work a holiday that fell on their normal day of work?

A: No, that issue was addressed, I want to say it was in 1998 in a staff meeting[8] that I was present at. And so, over the last 10 years, all specialized people had the option, it was their own option because of the concept of them losing court time and different things like that, that they could work up to 12 hours on a holiday if they so chose. The Chief was clear in that meeting that he didn't want that to cause an overtime issue, so that, if you're on an eight-hour schedule five days a week, and you work Monday, 12 hours on a holiday, then you had to take four hours off somewhere else during the week. So you didn't get overtime, too, but you could prevent any loss of holiday pay going from the road patrol to a specialized assignment.

Q: So from '98 to the end of 2007, employees have been allowed to work a holiday when that holiday fell on their normal day of work?

A: Yes. And there's been no dispute, that I'm aware of to this day, that that was the case, from commend staff or anyone else. That was always accepted.

* * * * * * * *

A: They have the option of working up to 12 hours.

According to Sergeant, because the ban against specialized assignment officers working holidays caused "such a huge hit," he talked to Captain who Sergeant assumes talked to Chief and "it was ultimately decided that we would be able to work holidays still, but only our normal work. We could no longer work the 12-hour days. And that's what has occurred up to this present day." Union Exhibits 2 and 3 are e-mails from Captain to the specialized assignment employees. They read as follows:

Monday, January 14, 2008
The hours of work on Monday 1/21/2008 (Martin Luther King Holiday) will be your regularly scheduled work day. Which will be 8.25 or 8.5 whichever you normally work.

* * * * * * * *

Friday, February 15, 2008
Until further notice all holidays that fall on your day to work are to either be taken off as a holiday or work you [sic] normal workday hours. If you have any questions please let me know.

[8] The evidence does not indicate whether this was a meeting of management personnel which Sergeant was attending in his role as a supervisor, a meeting between management and labor which Sergeant was attending in his role as a Union representative, or a meeting of all personnel. I infer from the use of the term "staff" meeting that this was not a meeting between management and labor which Sergeant was attending in his role as a Union representative. Even if my inference is incorrect, as the party with the burden of proof, the Union has not, by this testimony or in any other way, met its burden of proving that this was a labor/ management meeting. It should be noted that in later testimony, Sergeant refers to the discussion in this meeting as an agreement.

The Chief, on direct examination denied that there was an agreement "that any police officer can just choose to work whatever days they choose to work," and stated, "The reality of assigning work schedules is we assign work schedules based upon the individual's assignment and whatever it is that we need to be done for that assignment in a particular time frame." The following exchange occurred between the Employer's attorney and the Chief:

> Q. So if someone wants to work a 12-hour shift who is normally assigned an eight-hour day, how does that – or if they wanted to work a 12-hour shift?
>
> A. Well, in the case of the investigators, let's say with that discussion, if they wanted to work a 12-hour day, then they should go to their supervisor, their division commander, and say, I want to work a 12-hour day. And, if it's not a holiday, then there would need to be some justification as to, well, what are you doing for 12 hours that we need to do that, because that's going to incur overtime. If it's on a holiday, again justification, what will you be doing? Why do you need to be here for 12 hours that day? And then the person making the decision needs to decide, are we going to do that or not.
>
> Q. So has there been any point in time in your tenure as the chief of police at Miami Township that a union employee simply has the right to decide, I'm going to work X number of hours on this particular day?
>
> A. Not to my knowledge.

Regarding work schedules, the Chief testified that work schedules are posted and:

> Work schedules are determined by the two division commanders [captains] for road patrol and for support services depending on the assignment and what the work is. Now, schedules are posted pretty much long in advance of a given day. We try to put out what we call an exemplar schedule at the first of the year for the year. Because we can pretty well predict what normal work routines are going to be and what normal work schedules are going to be. That schedule is constantly in a state of flux. People are taking compensatory time. People taking vacation time or sick time. Maybe we need to adjust somebody's schedule because we're doing some special event, but we have a base schedule that we work from.

The Chief asserted that Captain's December 28, 2007 e-mails did not violate Section 14.6, because:

> [W]e didn't change anybody's work schedule, we simply told a group of people not to report to work on a particular day because it was a holiday. They were paid for the time off that day, but we didn't tell them, okay, now you have to work 3:00 to 11:00, you have to work midnights, just don't come to work on this day.

On cross-examination, when Chief was asked how many times over the last 10 years officers in specialized assignments worked 12 hours on holidays, he responded, "A lot of times. I'd have to do back and look at the records to tell you exactly how many times."

The Union called Sergeant back as a rebuttal witness. The Chief's testimony about obtaining permission to work a holiday was called to Sergeant's attention, and the following exchange took place:

Q. What's your understanding with respect to police requesting to work a holiday?

A: I'm not aware of anyone over the past 10 years, since the staff meeting I referred to back in 1998 where we discussed it with the Chief and the rest of command staff, that anyone has had to request special permission to work the holiday. And it's occurred, like the Chief said, a lot of times over the past 10 years. Actually, it's occurred regularly, probably on every holiday. I've never been asked and I don't know of anyone who has asked permission from their captain.

Q: When you say you've never been asked, you mean in your role as sergeant?

A: Correct.

Q: A subordinate has never come to you to ask to work a holiday?

A: No.

Q: And have you ever asked your supervisor to allow you to work a holiday?

A: No.

Q: Are you aware of anyone ever seeking permission?

A: No.

IV Positions of the Parties

A. The Union's Position:

The Union, in its brief, further refines the first part of the stipulated issue, "Did the Employer violate the collective -agreement when it refused to pay all employees 12 hours of holiday pay?" by restating it as "Are officers who work specialized assignments entitled to twelve (12) hours or eight (8) hours of holiday pay when a holiday falls on their normal day of work?" It is the Union's position that those who work specialized assignments and therefore regularly work 8.25, 8.5, or 10 hours a day, are entitled to 12 hours of holiday pay for each holiday, which is the holiday pay received by the road patrol officers who regularly work 12 hours a day. In support of this position, the Union points to Section 17.2, which states that all holidays are twelve hours in length. The

Union argues that, because the language of Section 17.2 is clear and unambiguous, the arbitrator is bound to agree with the Union's position and for the arbitrator to find otherwise would result in a modification or amendment of the agreement which is strictly prohibited under Section 8.6 Step 4(a).[9] The Union presented some evidence that specialized officers have been receiving 12 hours of holiday pay for each holiday in the past. Further, the Union argues that if the parties had intended to distinguish length of holidays according to assignments, they would have included such language in the agreement. The Union also maintains that the parties' settlement of a personal day grievance in about June 2007, is evidence that references to "day" in the agreement mean a 12-hour day.

As to the second half of the stipulated issue, "Did the Employer violate the collective-bargaining agreement when it refused to allow employees to work the holidays that fall on their normal workday?" the Union contends that "the Employer cannot prohibit or limit the number of hours a specialized assignment officer can work on a holiday." The Union argues that 10 years of past practice support this contention. In this regard the Union's brief states:

> It must be found that there is an established past practice of allowing specialized assignment officers to work twelve (12) hours on a holiday. It is 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. Elkouri and Elkouri, How Arbitration Works, (5th Ed., 632). As such, this past practice must be viewed as evidence of the intent behind the language as allowing specialized assignment officers work twelve (12) hours on a holiday. The Employer cannot rescind this binding 10-year past practice of allowing these officers to work up to twelve (12) hours on the holidays.

The Union also argues that the Employer violated Section 14.6 by changing employees' work schedules for January 1, 2008 without seven days notice.

Further, in support of its position regarding both portions of the stipulated issue, the Union argues that Section 36.10 (Section 36.9 above) which provides for equal and fair treatment to all members, requires that officers working specialized assignments must be paid 12 hours of holiday pay per holiday, as are road patrol employees, and must be

[9] The Union's brief actually refers to Section 8.6 Step 3(a), but, inasmuch as there is no Step 3(a) and Step 4(a) states that an arbitrator "may not modify or amend the Agreement," it is assumed that Step 4(a) was the intended reference.

allowed to continue to work up to 12 hours on a holiday at their own individual discretion. Also regarding both portions of the stipulated issue, the Union contends that the November 2, 2007 e-mail between the parties regarding the issues being arbitrated here, "is a mere clarification or interpretation of Section 17.2 as being applicable to all employees" rather than a change in the collective-bargaining agreement.[10]

The Union's requested remedy is that the arbitrator:

> A) Order the Employer to pay officers working specialized assignments twelve (12) hours of holiday pay starting Christmas Day 2007 and thereafter;
>
> B) Order the employer to cease and desist from ordering employees not to work a holiday or limiting the number of hours an employee can work on a holiday;
>
> C) Order the Employer to pay all of the employees for the number of hours they could have worked but were either prohibited or limited in the number of hours they were allowed to work on a holiday starting New Years Day 2008 and thereafter;
>
> D) Order the Employer to pay interest on the monies paid to employees under this award.

B. The Employer's Position:

The Employer contends that it did not violate the collective-bargaining agreement. In that regard, the Employer's brief states:

> [Section] 17.2 states that employees shall be paid holiday pay for hours worked on the holiday; [Section] 17.4 states that employees not scheduled to work will receive holiday pay equal to their [sic] the number of hours in their normal work day; and [Section] 17.5 states that employees who work on the holiday will be paid holiday pay for all of the hours actually worked. These sections are clear and unambiguous.

As to the Union's contention that employees, at their discretion, should be allowed to work on a holiday, and do so for up to 12 hours on each holiday, the Employer argues that the special duty employees generally have no need to work on a holiday and if any of them do have such a need "they would need to justify that desire to a supervisor." The Employer also argues that Section 36.10 (Section 36.9 above) "addresses the manner of conducting Internal Affairs Investigations, and is not related to payroll or leave issues;" but, if it is decided that this Section is "somehow related to the pending grievance, the Employer has shown that all employees are treated in a fair and equal manner." With

[10] This e-mail is quoted above in Part III.

regard to the Employer's alleged violation of Section 14.6 "since the notice not to work New Years day was not provided until December 28," the Employer contends that it was privileged to do so by the management rights specifically reserved to it in Section 6.1(b),(c),(d),(f), and (h), and that Section 14.6 was not implicated inasmuch as the purpose of Section 14.6 "is to deter the Employer from arbitrarily altering work schedules in such a fashion as to make it difficult or impossible for employees to manage their working hours in relationship to their non-working hours," which was not the case here.

V. Decision and Discussion

Despite the fact that the parties submitted this issue to arbitration after they could not resolve it in negotiations, this is a grievance arbitration, not an interest arbitration or fact-finding situation. In grievance arbitration, an arbitrator's determination is made within the parameters of labor arbitration law and accepted custom, as well as the arbitration provisions of the collective-bargaining agreement. An arbitration award is required to draw its essence from the parties' collective-bargaining agreement and cannot simply reflect the arbitrator's own notions of industrial justice.[11] In 2003, the Ohio Supreme Court held:

> The public policy favoring arbitration requires that courts have only limited authority to vacate an arbitrator's award. Accordingly, we have held that a reviewing court is limited to determining whether the award draws its essence from the CBA and whether the award is unlawful, arbitrary, or capricious. An arbitrator's award draws its essence from a collective bargaining agreement when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful.[12]

Here, Section 8.6 of the collective-bargaining agreements strictly limits the arbitrator to the interpretation, application, or enforcement of the specific articles of the agreements and prohibits the arbitrator's modifying or amending the agreements. Further, the Union bears the burden of proof.

Mindful of these parameters and for the reasons discussed below, I find that the Employer violated the collective-bargaining agreements only to the extent that it directed

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[11] Paperworkers v. Misco, Inc., 484 U.S. 29, 38 (1987).

[12] Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. of Fire Fighters v. Cleveland, 793 N.E. 2d 484 (Ohio 2003) (citations omitted).

employees who were scheduled to work on January 1, 2008, not to work on that day, without giving them the seven day notice required by Section 14.6. The Employer did not otherwise violate the collective-bargaining agreement when it refused to pay all employees 12 hours of holiday pay and refused to allow employees to work the holidays that fall on their normal workday.

A. The Employer did not violate the collective-bargaining agreement when it refused to pay all employees 12 hours of holiday pay

The resolution of the question posed in this part of the stipulated issue turns on whether officers working specialized assignments are entitled to 12 hours of holiday pay for each holiday. Article 17, the article of the collective-bargaining agreements which addresses holidays and only holidays, clearly says that the number of hours for which a bargaining-unit employee is to receive holiday pay for each holiday (regardless of whether he actually works that holiday) is determined by multiplying the number of hours in the employee's normal workday – 8.25, 8.5, or 10 hours for the specialized employees – by the employee's normal hourly rate of pay.[13] The Union limited its focus and its arguments regarding Article 17 to the second sentence of Section 17.2 which says that holidays are twelve hours in length. All of Article 17, however, addresses holidays and how employees' holiday pay and holiday compensation are to be determined; and Sections 17.4 and 17.5 are specifically applicable to resolving this part of the stipulated issue. Section 17.5 clearly and unambiguously states that employees required to work on a holiday shall receive holiday pay as defined in Section 17.4; and Section 17.4 clearly and unambiguously states that employees not scheduled to work on a holiday shall

[13] During the hearing and in the briefs there appeared to be confusion regarding what the terms "holiday pay" and "holiday compensation" mean. To avoid such confusion, be aware that when used herein the terms are NOT being used interchangeably, and they have different meanings: (1) "holiday pay" means the pay an employee receives for a holiday, simply because it is a holiday, regardless of whether the employee actually works on that holiday; and (2) "holiday compensation" means the pay received for actually working on the holiday. The use of these terms in this way is consistent with their use in Article 17 of the collective-bargaining agreements. For example, the third sentence of Section 17.2 says that an employee who works the holiday is entitled to "holiday compensation" (not holiday pay) for the hours he works. Additionally, the record contains some indications that there is some belief that the amount of holiday pay one receives is contingent on the number of hours the employee works on that holiday. That is not what Article 17 says or means.

receive "as 'holiday pay', their normal hourly rate times the number of hours equal to their normal work day."[14]

Here, evidence of past practice does not call for a contrary result. As discussed above, the relevant provisions of Section 17.4 and 17.5 are clear and unambiguous on their face – their language, when read without preconceived ideas as to its meaning, is not susceptible to more than one meaning with regard to how holiday pay is to be determined.[15] Because that language is not ambiguous, the parole evidence rule precludes consideration of evidence, such as past practice, to interpret its meaning.[16] Further, to decide that past practice prevails over clear contract language is unusual, especially in the presence of a detailed zipper clause such as the one included in the parties' collective-bargaining agreements at Section 40.3, and contract language such as appears in Section 8.6, strictly limiting the arbitrator to enforcing the specific articles in the agreement and prohibiting the arbitrator from modifying or amending it.[17]

Section 36.9[18] does not require a different result, notwithstanding the Union's position to the contrary. The Employer contends that Section 36.9 is inapplicable to this dispute in that it addresses the manner of conducting Internal Affairs Investigations. The Employer's argument tends to be supported by the context of Section 36.9 provided by the other sections of Article 36, all of which do appear to pertain to investigations of bargaining-unit members. In any event, under the circumstances here, an arbitral award which is directly contrary to specific, clear and unambiguous language in a contract, but

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[14] Emphasis added.

[15] Elkouri & Elkouri, How Arbitration Works 434 (Alan Miles Rubin ed., 6th ed. 2003) and authority cited therein.

[16] The parole evidence rule is a substantive rule of law barring the consideration of extrinsic evidence, such as evidence of past practice or testimony as to what occurred at the bargaining table, to supplement the final written expression of the parties' agreement. This rule does not exclude consideration of extrinsic evidence offered to interpret the terms of an agreement when the language is "ambiguous," because the evidence is not directed to the determination of the content of the agreement, but rather to the meaning of the terms. The meaning contended for through the offering of that evidence, however, "must be one to which the language of the writing, read in context, is reasonably susceptible." *Id.* at 440-41 (citing Restatement (Second) of Contracts §215 cmt. b.)

[17] Elkouri & Elkouri, How Arbitration Works 620-23 (Alan Miles Rubin ed., 6th ed. 2003).

[18] Section 36.10 in the Agreement which is effective by its terms from January 1, 2005 through December 31, 2007.

is based on such a general affirmance of intended fairness as appears in Section 36.9, would not "draw its essence from the parties' collective-bargaining agreement."[19]

Also failing to prevail are the Union's arguments that if the parties had intended to distinguish the length of holidays according to assignments, they would have included such language, and that the parties' previous settlement of a personal day grievance is evidence that references to "day" in the agreement mean a 12-hour day. Despite the Union's astute attempt to frame the analysis differently, neither the assignment of the employee, nor the length of a day is dispositive of this portion of the issue. Rather, as explained above, it is the number of hours in the employee's normal workday that determines the number hours of holiday pay that employee is to receive.

B. The Employer did not violate the collective-bargaining agreement when it refused to allow employees to work the holidays that fall on their normal workday, except to the extent that it directed employees who were scheduled to work on January 1, 2008, not to work on that day, without giving them the seven day notice required by Section 14.6.[20]

The Union's position regarding this portion of the issue is that "the Employer cannot prohibit or limit the number of hours a specialized assignment officer can work on a holiday." However, as discussed below, the Employer has the right to schedule employees for holidays, and that right is not eliminated by an explicit provision of the contract or by past practice.

Here, the Union relies on an asserted past practice of allowing each specialized assignment employee to work up to 12 hours on any holiday, at the employee's individual discretion. Although the Union argues that this asserted past practice must be viewed as evidence of the "intent behind the language," the Union does not cite to any specific contract provision or language as arguably supporting its position. Further, my review of the contract failed to reveal any specific contract provision or language supporting the Union's position.

The question of the Employer's right to schedule employees is relevant here. Most arbitrators recognize that, except as restricted by the parties' agreement, the right to

[19] *See* n. 11, above

[20] The Employer's violation of Section 14.6 is discussed separately, below.

schedule work remains in management.[21] Here, in Article 6, Management Rights,[22] Section 6.1 reserves to management specifically listed rights, "except as expressly limited by the terms and conditions set forth in this Agreement;" and Section 6.2 states that "all rights and responsibilities of the Employer not specifically modified by this Agreement shall remain the functions of the Employer."[23] Even though Section 6.1 does not specifically include the right to "schedule" in its list of reserved rights and responsibilities, the Employer contends that Section 6.1(b),(c),(d),(f), and (h) privilege the Employer to determine when employees are to work. Also relevant here is a portion of the Ohio statute under which this collective-bargaining relationship is established and maintained. Ohio Revised Code § 4117.08(C)[24] provides that, unless a public employer agrees otherwise in a collective-bargaining agreement, the statute does not impair specifically listed rights and responsibilities of that public employer; and § 4117.08(C)(5) specifically lists the right to "schedule" employees as one of those retained employer rights and responsibilities.[25] The record contains no evidence of, or reference in argument to, provisions in the parties' collective-bargaining agreements which eliminate the Employer's right and responsibility to schedule or not schedule employees to work on holidays. Of course the number of hours they work, if scheduled, may be impacted by agreement provisions not specific to holidays and, as discussed below, the notice requirement of Section 14.6 applies to employees scheduled to work on holidays.[26]

The Union contends that there exists a 10-year past practice of allowing officers to work up to twelve (12) hours on holidays which the "Employer cannot rescind." In other words, the Union maintains that bargaining-unit employees are now free to work up

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[21] Elkouri & Elkouri, How Arbitration Works 722 (Alan Miles Rubin ed., 6th ed. 2003). *See generally, Id.* at 722 to 737 and Elkouri & Elkouri, How Arbitration Works, 2008 Supplement 282-284 (Alan Miles Rubin ed., 2008), regarding the scope of management's rights to schedule and limitations thereon.

[22] Article 6 is quoted above in Part II.

[23] Emphasis added.

[24] Ohio Revised Code § 4117.08(C)(5) is quoted above at Part II.

[25] Emphasis added.

[26] Other contract provisions of general application may also limit this management right in ways not applicable here.

to 12 hours on any holiday, solely at their individual discretion, and the Employer must pay them for doing so. Citing Elkouri, the Union argues that this asserted past practice is binding because it is "1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties." Elkouri certainly does indicate that these criteria are considered important by many arbitrators in determining if an established past practice exists. It prefaces this quotation with the statement, "When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required."[27] Further, in discussing "the 'employee benefit'/'basic management function' dichotomy in determining whether a practice has binding effect," it also states that "arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of traditional and recognized functions of management" such as scheduling employees.[28] "If a right is explicitly provided for in a collective bargaining agreement, the nonexercise of that right does not amount to a 'negative past practice' and thus become a forfeiture of it when challenged."[29] The proven fact that an employer, over a 10-year period, consistently used the same method or approach to scheduling employees to work holidays and/or a proven consistent pattern of employees always working a given number of hours on holidays, would not necessarily lead to an arbitral finding that the employer's reserved contractual right to schedule employees with regard to holidays, has been eliminated or otherwise modified by this practice.[30]

In any event, here, the record evidence of past practice falls short of the standard enunciated by the Union. The Union, whose burden it is to prove the past practice, presented no documentary evidence such as time records or employee schedules. Except for the November 2, 2007 e-mail, it relied solely on testimony. In this regard, Grievant testified that for his first three holidays after he transferred from road patrol in April 2007, he worked and was paid for working 12 hours on each of the holidays. He also

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[27] Elkouri & Elkouri, How Arbitration Works 607 (Alan Miles Rubin ed., 6th ed. 2003).

[28] *Id*. at 608, 612.

[29] Elkouri & Elkouri, How Arbitration Works, 2008 Supplement 239 (Alan Miles Rubin ed., 2008).

[30] *See Id*. and cases cited therein.

testified that (1) when he was interviewed before transferring he was assured that he would be able to work 12 hours on any holiday that fell on his regular workday and he would receive 12 hours of holiday pay; and (2) "it wasn't like that was a bonus to me or anything else, that was the practice at the time." The evidence indicates that Grievant had been the Union representative for officers and corporals until 2005, but provided no other basis for his knowing what the past practice in this area was, especially prior to his April 2007 transfer.

Sergeant testified that, in a June 2007 meeting with Chief, he informed the Chief that there was a similar (unexplained) issue on the horizon "which was the holiday issue." This testimony tends to indicate that, contrary to the general thrust of the Union's presentation, there were some inconsistencies in the asserted past practice before Columbus Day. The Sergeant also testified that since a staff meeting in about 1998 the fact that employees could work up to 12 hours on any holiday at their individual discretion had been settled. He also alluded to this as an agreement in other testimony. But, there is no record evidence of what was actually said in this meeting to lead Sergeant to either of these conclusions and, as is pointed out in the facts section,[31] the evidence does not indicate what kind of meeting this was. The Sergeant makes other conclusory statements that employees have been allowed to work, or have not been ordered or prevented from working up to 12 hours on holidays at their discretion, but there is little evidence as to the basis of his knowledge of this. Indeed, often he would qualify his testimony with "to my knowledge" or words to that effect. The evidence indicates that Sergeant has been a sergeant since 1996 and was the Union representative for the sergeants' unit for 10 years. It does not, however, say whether or not he worked all that time in road patrol. The evidence does indicate that Sergeant only assumed his present position as supervisor of most of the specialized assignment officers on December 31, 2007.[32] This general information about Sergeant's background does not prove that he was in a position to have the detailed knowledge of what was happening with regard to the specialized assignment officers and holidays, in order to give his conclusory

[31] *See* n.8, above.

[32] *See* n.3, above.

statements sufficient weight to establish a past practice which is "1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties."

Neither the November 2, 2007 e-mail nor Chief's testimony is proof of the asserted past practice. The e-mail says that employees can continue to work holidays as before as long as the holiday falls on their normal work day. The fact that it uses the work "can" implies that it was still within the Employer's rather than the employee's discretion to decide whether employees could, or would work on holidays. Further, the e-mail does not tell us how the employees worked holidays before the e-mail; it just tells us that they could continue as before, whatever that was. The practice followed before could have just as easily been that each employee worked only with the permission of Captain in every case, as it could have been that each employee decided for himself whether and how long to work on holidays. Finally, the Chief's testimony[33] contradicts Union's contention that the asserted past practice was "a fixed and established practice accepted by the parties." Even the Chief's response on cross-examination to the effect that officers in specialized assignments had worked 12 hours on holidays "a lot of times," does not speak to whether they did so at their own discretion.

As to the Union's position with regard to the impact of Section 36.9 on this part of the issue, as discussed above, the context of Article 36 tends to support the Employer's contention that Section 36.9[34] is inapplicable here in that it addresses the manner of conducting Internal Affairs Investigations. Even if it does not, to base my finding here on what I deem to be "equal and fair" treatment would be tantamount to improperly basing it on my "own notions of industrial justice."[35]

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[33] *See* Part III, above.

[34] Section 36.10 in the Agreement which is effective by its terms from January 1, 2005 through December 31, 2007.

[35] *See* n.11 above.

C. The Employer violated the collective-bargaining agreements to the extent that it directed employees who were scheduled to work on January 1, 2008, not to work on that day, without giving them the seven day notice required by Section 14.6[36]

The Employer contends that it was privileged by sections of Article 6, Management Rights, to, on December 28, 2007, direct the employees who were scheduled to work on January 1, 2008, not to work on that day. However, unlike in the situation above where I found that the Employer's right to schedule prevailed, in this situation, the Employer's right to schedule is purportedly limited by a specific contract provision, namely Section 14.6. The Employer argues that this action did not violate Section 14.6 because the purpose of Section 14.6 "is to deter the Employer from arbitrarily altering work schedules in such a fashion as to make it difficult or impossible for employees to manage their working hours in relationship to their non-working hours," and that is not the case here. The Employer did not indicate the source of its position on the purpose of Section 14.6. In fact, not much evidence was presented regarding this specific issue. The context of Section 14.6, the other sections of Article 14, does not provide support for the Employer's position regarding its meaning. Inasmuch as no one has challenged this section or any of its language as being ambiguous or unclear on its face, and it is not obviously ambiguous or unclear on its face, there is no reason to rely on parole evidence as to its meaning, especially assertions such as the Employer's which are presented without foundation. Accordingly, I find that, here, Section 14.6 did apply. Thus, the Employer did violate Section 14.6 to the extent that it, on December 28, 2007, directed employees who were scheduled to work on January 1, 2008, not to work on that day.

VI Award

The grievance is sustained in part and denied in part.

The Employer is directed to make whole[37] all bargaining-unit employees who were scheduled to work January 1, 2008, but did not work that day because the Employer directed them not to work without giving them the seven-day notice which I have found

[36] Section 14.6 provides: "Regular work schedules shall be posted ten (10) days prior to their effective date. Seven (7) days notice must be given to any non-emergency change in a posted schedule."

[37] This make whole remedy includes the payment of reasonable interest.

is required by Section 14.6 of the parties' collective-bargaining agreements. I will retain jurisdiction for 40 days following the issuance date of this Decision and Award solely to resolve disputes regarding the directed remedy. If a party advises me of a dispute regarding the implementation of the directed remedy within that 40-day period, my jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If a party does not advise me of the existence of a dispute regarding the remedy directed herein within the 40-day period indicated above, my jurisdiction over this grievance shall then cease.

Decided this 20th day of November, 2008.

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Saundria Bordone, Arbitrator